Supreme Court, U.S.
FILED
DEC 19 2003
OFFICE OF THE CLERK

(4)

NO. 03-377

IN THE
Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,
Petitioner,

v.

BRADLEY NIGH,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ALLISON M. ZIEVE
BRIAN WOLFMAN
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
202-588-1000

A. HUGO BLANKINGSHIP, III
Counsel of Record
BLANKINGSHIP &
ASSOCIATES
516½ ORONOCO STREET
Alexandria, Virginia 22314
703-739-7621

Counsel for Respondent
Bradley Nigh

December 2003

QUESTION PRESENTED

The civil liability provision of the Truth in Lending Act provides, in relevant part, that any creditor who violates the Act "with respect to any person is liable to such person in an amount equal to the sum of—"

> . . . (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000[.]

15 U.S.C. § 1640(a)(2)(A). The parties agree that "this subparagraph" does not include (A)(iii). The question presented is

Whether the phrase "liability under this subparagraph," and thus the limitation on damages awards set forth in (A)(ii), applies just to (A)(ii) or to both (A)(i) and (ii).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

Factual Background 1

Proceedings Below 2

REASONS FOR DENYING THE WRIT 5

A. There Is No Meaningful Split On The Question Presented 5

B. Petitioner's Complaints About TILA Offer No Basis For Review 7

C. The Decision Below Is Supported By The Unambiguous Language Of The Statute 8

CONCLUSION 11

TABLE OF AUTHORITIES

CASES Pages

In re Derienzo,
282 B.R. 586 (M.D. Pa. 2002) 7

Dewsnup v. Timm,
502 U.S. 410 (1992) 10

I.N.S. v. St. Cyr,
533 U.S. 289 (2001) 6

Mars v. Spartanburg Chrysler Plymouth,
713 F.2d 65 (4th Cir. 1983) 3, 6

Mathias v. Accor Economy Lodging,
347 F.3d 672 (7th Cir. 2003) 8

Strange v. Monogram Credit Card Bank,
129 F.3d 943 (7th Cir. 1997) 5, 6

STATUTES

15 U.S.C. § 1640(a)(2)(A) (1995) ..... *passim*

15 U.S.C. § 1640(a)(2)(A) (1983) 3

STATEMENT OF THE CASE

FACTUAL BACKGROUND

In February 2000, respondent Bradley Nigh contracted to purchase a 1997 Chevrolet Blazer from petitioner Koons Buick. As part of the transaction, Mr. Nigh traded in his truck and made a $4,000 down payment. He got no price discount for his trade-in because he estimated the remaining loan balance to equal the price that Koons Buick gave him for the truck. Mr. Nigh signed a Buyer's Order, reflecting the proposed purchase, and a retail installment sales contract, reflecting the proposed financing. Mr. Nigh left his truck and drove home in the Blazer. App. 2a.

Koons Buick was unable to find a lender to purchase the assignment of the installment payments. It therefore decided to restructure the deal to require an additional $2,000 down payment. Koons Buick represented to Mr. Nigh that this change was a "better deal" at a lower rate and that he had to sign a new contract. Mr. Nigh returned to the dealership and told Koons Buick that he did not have an additional $2,000. He asked Koons Buick to allow him to return the Blazer, take back his truck, and walk away from the deal. Koons Buick told him—falsely—that he could not withdraw from the deal because it had already sold his truck. Mr. Nigh, "unaware of this statement's falsity, and at a loss," signed a new contract and a $2,000 Promissory Note. *Id.* 3a.

Again, Koons Buick could not find a lender; and, again, it called Mr. Nigh to sign another contract. Mr. Nigh alleged that Koons Buick left a message that if he did not come to sign the new contract, it would report the Blazer as stolen. Afraid of being arrested, Mr. Nigh returned to Koons Buick and signed the contract under protest.

Mr. Nigh stopped making payments on the note for his trade-in vehicle when he believed that it had become the property of Koons Buick. He later learned that his truck had not been sold as Koons Buick represented to him, but rather had been repossessed by its note-holder from the lot of Koons Buick because of non-payment on the note. He also learned that one reason Koons Buick could not find a lender to assume the second contract was that it wrongfully included a $965 charge for an accessory that Mr. Nigh had neither requested, agreed to accept, nor received. *Id.* 3a-4a.

Even after the transaction closed, Koons Buick did not transfer title of the Blazer to Mr. Nigh. Approximately six weeks after signing the third contract, Mr. Nigh returned the Blazer to Koons Buick with a letter stating that he was enforcing his right to rescind the transaction and recover his down payment and trade-in. (JA 772.) Koons Buick refused to accept the rescission and yet continued to withhold the title.

PROCEEDINGS BELOW

Nigh brought suit against Koons Buick, alleging claims under the Truth In Lending Act (TILA), the Federal Odometer Act (FOA), the Virginia Consumer Protection Act (VCPA), and common law fraud. Koons Buick filed a counterclaim for breach of contract and for fraudulent and negligent misrepresentation. The district court granted summary judgment on some claims, and other claims were tried to a jury. The jury found that Koons Buick violated TILA "by intentionally including a charge" on the sales contract "with knowledge that there was no basis for the charge," App. 9a, and that Koons Buick violated the VCPA by falsely telling Mr. Nigh that it no longer had possession of his trade-in, so as to induce him to sign a new sales contract. *Id.* 4a. The jury

awarded Mr. Nigh $24,192.80 (twice the amount of the finance charge in connection with the transaction) for the TILA violation and $4,000 for the VCPA violation. *Id.* 2a.[1]

Each party appealed various aspects of the district court judgment to the Fourth Circuit. For present purposes, the only relevant issue is Koons Buick's argument that TILA, 15 U.S.C. § 1640(a)(2)(A), capped the damages award at $1,000. Koons Buick based its argument on *Mars v. Spartanburg Chrysler Plymouth*, 713 F.2d 65 (4th Cir. 1983). There, the court of appeals was applying a prior version of TILA, which provided that damages would be equal to

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability **under this subparagraph** shall not be less than $100 nor greater than $1,000[.]

15 U.S.C. § 1640(a)(2)(A) (1983) (emphasis added). In *Mars*, the court of appeals had assumed, without analysis, that the bold-faced language applied to both (i) and (ii), and therefore that damages awarded under either (i) or (ii) were limited to $1,000. 713 F.2d at 67.

---

[1]The jury also found that Koons Buick had violated the FOA but did not find the requisite intent to defraud.

Looking to the current version of section 1640((a)2)(A), the Fourth Circuit rejected Koons Buick's reliance on *Mars*. Since its amendment in September 1995, section 1640(a)(2)(A) provides that creditors that violate TILA may be liable for

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability **under this subparagraph** shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000 [.]

15 U.S.C. § 1640(a)(2)(A) (emphasis added). In an opinion by Judge Luttig, the court held that, although its prior assumption about the scope of "this subparagraph" was "plausible" in 1983, the 1995 amendment "rendered [that] interpretation "defunct." App. 11a. The court held that, under the plain language of section 1640(a)(2)(A), "this subparagraph" referred only to (ii)—the subparagraph in which the words appear. Accordingly, the court of appeals upheld the jury's award of twice the amount of the finance charge. *Id.* 11a-13a.

Judge Gregory dissented on the basis that the legislative history of the 1995 amendment did not manifest a specific intent to overrule the reading given to the prior version of section 1640(a)(2)(A) in *Mars*. *Id.* 17a.

REASONS FOR DENYING THE WRIT

A. There Is No Meaningful Split On The Question Presented.

Koons Buick's primary argument for review is that the decision below conflicts with the Seventh Circuit's decision in *Strange v. Monogram Credit Card Bank*, 129 F.3d 943 (7th Cir. 1997). The *Strange* decision does not support a writ of certiorari for several reasons.

In *Strange*, defendant Monogram failed to credit plaintiff Strange's credit card for an item that Strange had returned to a store and failed to respond Strange's letters asking that the error be corrected. In February, 1995, Strange brought suit under TILA and sought "statutory damages in the amount of twice the finance charge not to exceed $1000 in accordance with 15 U.S.C. § 1640(a)(2)." *Id.* at 945; *see* Docket Sheet, www.ca7.uscourts.gov/dkt.fwx. The trial court found that the company had violated TILA by failing to send Strange a written explanation of the billing error and awarded Strange $1,000. Monogram moved for reconsideration, asking that the award be reduced to $100. In response to that motion, the court reduced the award to $54.72, twice the amount of the erroneously billed finance charge. *Id.* On appeal, Strange argued that he was entitled to the statutory minimum of $100. Monogram agreed. *Id.* at 946-47.

Although the court recognized that both sides agreed on the proper reading of 15 U.S.C. § 1640(a)(2)(A), it chose to address the issue anyway because "this is a pure question of law on a matter of considerable commercial interest." *Id.* at 947. Because the Seventh Circuit reached its decision with no adversarial briefing or argument on the question presented here,

Strange is thus a particularly weak case on which to base a conflict argument.

Moreover, the opinion in *Strange* does not disagree with the Fourth Circuit below that the plain meaning of section 1640(a)(2)(A) sets no statutory minimum or maximum on damages awarded under subpart (i). *See id.* at 947 (reading limits to apply only to subpart (ii) "has a certain appeal," but rejecting reading based on history of statute). The Seventh Circuit opinion notes, however, that before the 1995 TILA amendments, other courts interpreted the limits on damages awards to apply to both (i) and (ii). The court then states, without citation, that Congress did not intend the 1995 amendments to effect any change to subpart (i). 129 F.3d at 947. Significantly, the only appellate decision cited for the proposition that the limits set forth in subpart (ii) applied to subpart (i) under the prior version of the statute is the Fourth Circuit's decision in *Mars*, 713 F.2d at 67, which, as noted above, assumed without analysis that awards under (i) were subject to the limits of (ii). Yet the Fourth Circuit itself (in its decision in this case) has, since *Strange*, expressly found that its analysis in *Mars* is inapplicable to the current version of section 1640(a)(2)(A). By rejecting the very use of its own precedent that the Seventh Circuit employed, the decision below has weakened the reasoning of *Strange*.

Strange is a weak precedent, and thus a poor basis for establishing a conflict, for another reason. Plaintiff Strange filed his case in February 1995—seven months before section 1604(a)(2)(A) was enacted. Because the amendment was not retroactive, *see I.N.S. v. St. Cyr*, 533 U.S. 289, 315-16 (2001), the court of appeals erred in assuming that the amended statute applied. For this reason, as well as the lack of adversarial briefing, one wonders whether the Seventh Circuit would even

feel bound by *Strange*, were the issue presented to it in a proper case. In any event, in light of the peculiar procedural posture in *Strange* and the intervening decision below—the only appellate decision to have addressed the question in a genuinely meaningful and adversarial context—the Seventh Circuit would likely want to revisit the decision in *Strange* en banc, even if a Seventh Circuit panel would not.

Because no other court of appeals has addressed the question presented here in a case in which the issue was properly presented, the petition should be denied.[2]

B. Petitioner's Complaints About TILA Offer No Basis For Review.

Koons Buick also argues that review is warranted because the decision below will increase consumers' recoveries under TILA, and will thus cost defendants more money. First, that complaint is properly presented to Congress, not to this Court.

Second, Koons Buick's argument is not necessarily correct. To begin with, in many cases, the Fourth Circuit's reading of TILA's plain language will result in a *lower* award than Koons Buick's reading. For example, on the facts presented in *Strange*, the Fourth Circuit would award $54.72, rather than $100, because twice the finance charge was less

---

[2]Outside the Fourth and Seventh Circuits, the only case interpreting section 1604(a)(2)(A), since it was amended in 1995, appears to be *In re Derienzo*, 282 B.R. 586 (M.D. Pa. 2002). That decision is in accord with the decision below and expressly rejects *Strange*.

than the minimum set forth in section 1604(a)(2)(A)(ii). Moreover, although Koons Buick cites statistics to show that TILA is often violated by lenders or creditors such as itself, it does not cite any current cases to show that these violations result in undue or unjustified litigation. In fact, the most recent case cited for the proposition that companies are subject to undue TILA litigation is from 1984. Pet. 18.

Finally, Koons Buick's perverse attempt to garner sympathy for itself and companies like it on the basis that "TILA is the most commonly violated consumer protection law," Pet. 16, counsels *against* granting the petition. If TILA is often violated, the cure is to provide consumers with more, not fewer, incentives to enforce their rights and to impose higher, not lower, penalties that would deter violations.[3]

C. The Decision Below Is Supported By The Unambiguous Language Of The Statute.

As Judge Luttig found, the plain language of section 1640(a)(2)(A) supports only one reading: that the limits stated

---

[3]Even further afield, Koons Buick claims that the meaning compelled by the plain language of the statute may lead to excessive awards, vulnerable to constitutional challenge. Pet. 24 (citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003)). Apart from the question whether this Court is inclined to extend *State Farm* to damages other than punitives, Koons Buick has cited no TILA case, including this one, in which the award poses a constitutional problem. *See also Mathias v. Accor Economy Lodging*, 347 F.3d 672 (7th Cir. 2003) (where actual damages relatively small, larger ratio of compensatory to punitive damages may be justified).

in subpart (ii) apply only to awards under subpart (ii). Again, the provision states:

> **(2)(A)(i)** in the case of an individual action twice the amount of any finance charge in connection with the transaction, **(ii)** in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, **except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000**, or **(iii)** in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000[] (emphasis added).

The question presented is simply to what subsections "under this subparagraph" refers: to (i) and (ii), or only to (ii). Because (iii) states its own maximum and minimum, everyone agrees that "under this subparagraph" does not include (iii). Pet. 22 n.14 (stating that "obviously" the phrase does not include (iii)). Given that agreement, the "subparagraph" referred to in section 1604(a)(2)(A)(ii) cannot be (A). And (i) and (ii), taken together, do not constitute a discrete subparagraph. Accordingly, when (ii) says "this subparagraph," it must be referring to itself, that is, to (ii).

Koons Buick does not address this analysis. Instead, it argues that the phrase "under this subparagraph" is superfluous under the Fourth Circuit's reading, and thus that "this subparagraph" must refer to two out of the three parts of (A). However, as Judge Luttig pointed out, the limitations in (ii) are

separated from the first two types of award calculations only by a comma. Arguably then, without the phrase "under this subparagraph," the limitations might be read to apply to both (i) and (ii). Using the phrase, Congress made clear that the limits apply only to "this" subparagraph. Again, the only discrete subparagraph to which "this" could possibly refer is (ii).

The word "subparagraph" also appears in section 1640(a)(2)(B). Because in subpart (B) the word "subparagraph" indisputably refers to all of (B), Koons Buick argues that in section 1640(a)(2)(A)(ii) the word must refer to all of (A). This theory misses the mark. First, as mentioned above, Koons Buick concedes that the first use of "subparagraph" does not refer to all of (A). Pet. 22 n.14. Its contention is that "this subparagraph" refers to two-thirds of (A)—a reading inconsistent with its own argument about (B). Second, unlike (A), (B) has no subparts. Thus, each use of the word "subparagraph" refers to the "sub" in which the word appears: to (A)(ii) and to (B). Perhaps Congress could have used the awkward term "sub-subparagraph" to refer to (A)(ii), but surely no rule of statutory interpretation requires it to have done so.

Koons Buick is correct that Congress did not state either way whether it intended the 1995 amendment to affect the scope of the term "this subparagraph." Congress's silence on this point, however, is of no help to Koons Buick. *See Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992) ("Of course, where the language is unambiguous, silence in the legislative history cannot be controlling."). Perhaps, as Koons Buick would have it, Congress intended to maintain the reading previously assumed by the Fourth Circuit in *Mars*. Yet it is equally plausible that Congress intended either to correct the erroneous assumption (reflected in *Mars*) that the limits stated

at the end of (ii) applied to damages under (i), or that Congress intended to repeal what until then had been a cap on awards under (i). The legislative history simply does not say. Congress expressed its intent only through the text of section 1640(a)(2)(A). That text is susceptible to only one interpretation, as the Fourth Circuit held.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Allison M. Zieve
Brian Wolfman
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
202-588-1000

A. Hugo Blankingship, III
Counsel of Record
BLANKINGSHIP &
ASSOCIATES
516½ Oronoco Street
Alexandria, Virginia 22314
703-739-7621

Counsel for Respondent
Bradley Nigh

December 2003